BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA G. PURINTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,029,061
GEORGE J. SHAW CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOCIATION SELF-INSURERS' FUND OF KANSAS	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund appealed the May 17, 2007, Award entered by Special Administrative Law Judge John Nodgaard. The Board heard oral argument on August 22, 2007.

APPEARANCES

Daniel L. Smith of Overland Park, Kansas, appeared for claimant. C. Anderson Russell of Kansas City, Missouri, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At the regular hearing, the parties also stipulated the exhibits that were introduced at the preliminary hearings would be part of the record for purposes of final award.

ISSUES

Although the May 17, 2007, Award decided two docketed claims, the parties agree the only claim that is before the Board on this appeal is Docket No. 1,029,061. In that claim, claimant alleges she injured her upper back, left shoulder, neck and left arm on November 14, 2005, working for respondent when she pulled on a four-foot-long pry bar and the bar slipped from the nail she was trying to remove from a piece of wood.

In the May 17, 2007, Award, the Judge found claimant sustained an 11 percent whole person impairment due to her neck, upper back, and left shoulder injuries, along with an 87.5 percent task loss and a 73 percent wage loss followed by a 78.5 percent wage loss. Accordingly, the Judge awarded claimant permanent disability benefits under K.S.A. 44-510e for an 80 percent permanent partial disability through August 30, 2006, followed by an 83 percent disability.

In the other claim, Docket No. 1,027,061, Judge Nodgaard addressed claimant's alleged low back injury and denied claimant's request for benefits. Neither party requested that decision be reviewed.

Respondent contends Judge Nodgaard erred. Respondent argues claimant's permanent disability rating should be limited to her functional impairment rating as claimant chose to take disability retirement rather than continue doing accommodated work for respondent at her full union carpenter wages. In addition, respondent argues claimant chose to take disability retirement because of injuries that she sustained before her November 14, 2005, accident. Finally, respondent argued that in the event the Board finds claimant made a good faith effort to return to appropriate employment, the claim should be remanded to the Judge for additional evidence and a decision of task loss and wage loss relative to the neck, upper back, and left shoulder injuries only.

Conversely, in her brief to the Board claimant argued she had exercised good faith in trying to find appropriate employment and, therefore, she had sustained a 96.3 percent wage loss, which would increase her permanent partial general disability to 91.9 percent. At oral argument, however, claimant argued the May 17, 2007, Award should be affirmed in all respects.

Respondent does not challenge the Judge's finding that claimant's November 14, 2005, accident arose out of and in the course of her employment with respondent and it resulted in permanent injuries to her neck, upper back, and left shoulder. Similarly, neither party challenges the Judge's finding that claimant sustained an 11 percent whole person functional impairment.

Distilled to its essence, the only issues before the Board on this appeal are:

1. Did claimant make a good faith effort to return to work for respondent to perform work that respondent thought was compatible with her work restrictions and limitations?

2. What is claimant's post-injury wage for purposes of the permanent partial general disability formula?

3. Should the Board remand the claim for additional evidence?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

At the time of the regular hearing, claimant was 47 years old and had worked as a carpenter for 22 years. She worked for respondent as a concrete form carpenter for several years.[1] Claimant regularly lifted and handled heavy panels used for pouring concrete walls and columns; lifted and handled lumber; used power tools including hammer drills and saws; set anchor bolts and templates; set up, moved, and tore down scaffolding; and used a sledgehammer to set stakes. In short, the work was physically demanding and required claimant to lift objects weighing over 75 pounds.

On November 14, 2005, claimant fell backwards when the pry bar she was using to pull nails slipped off a nail. The incident resulted in injuries to her neck, upper back, and left shoulder. As the claim for the alleged low back injury in Docket No. 1,027,061 has been resolved, these findings will focus upon the November 14, 2005, accident. As a result of that accident, claimant initially missed one week of work and began a two-week period of physical therapy.

On November 21, 2005, while still receiving physical therapy, claimant returned to work for respondent and experienced increased symptoms of pain between her shoulder blades. In the latter part of December 2005, claimant began treating with Dr. Roger W. Hood. Under Dr. Hood, claimant began a period of physical therapy that began in December 2005 and lasted through April 2006. The doctor also prescribed medications and placed claimant under work restrictions.

Meanwhile, claimant continued working for respondent. Although the record is not entirely clear, it appears claimant worked from November 21, 2005, through January 5, 2006, when she left work and advised respondent's management that her work was exceeding her work restrictions, which limited her to lifting no more than 10 pounds and pushing or pulling no more than 30 pounds. Claimant testified she was picking up curb forms, driving stakes, carrying lumber that was up to 14 and 16 feet long, handling heavy sheets of plywood, and using a hammer drill to drill holes in concrete. After January 5, 2006, claimant returned to work for respondent but was given the same work. Consequently, claimant again left work on February 6, 2006, due to increased pain in her

[1] At one point claimant testified she had worked for respondent for five years. But at another point, claimant testified she had worked for respondent from eight to 10 years.

upper left arm and between her neck and shoulder blades. Claimant described the situation as follows:

> My last day at work [in February 2006] they just sent me and one other guy out to do weather protection. For some reason our laborer wasn't there, so that day we had to do everything by ourselves, including carrying all the lumber quite a distance, heavy tarps, weather protection tarps.[2]

On February 23, 2006, Dr. Hood restricted claimant from operating a hammer drill. That day, Dr. Hood wrote the insurance fund involved in this claim and stated, in essence, that claimant should take early retirement as she could no longer perform the heavy labor activities of a carpenter and that she could only perform light duty work. Claimant spoke with respondent's management about light duty work in the office but she was told there was none available.

From April 10, 2006, through April 28, 2006, claimant received physical therapy primarily for her neck. Claimant's physical therapist, however, testified very little was accomplished despite their efforts. Before therapy concluded, claimant returned to work for respondent on April 18, 2006. According to claimant, her job that day was putting anchor bolts in piers. Although claimant and a co-worker lifted the heavy templates together, the work violated claimant's restrictions and increased the pain between her shoulder blades and in her neck. Because of her pain, claimant estimated she worked only three of the six hours that she was at the job site.

When claimant testified at a preliminary hearing that was held on July 20, 2006, she had not returned to work for respondent following April 18, 2006, as she had been advised no work was available. In addition, claimant had contacted her union, which had been unable to place her with another employer. Claimant applied for, and began receiving, unemployment benefits.

Dr. Hood eventually released claimant from treatment in early May 2006, rated her impairment, and assigned her permanent work restrictions. The doctor wrote the insurance fund in this claim and advised that claimant should avoid repetitive overhead work and lifting more than 25 pounds.

Shortly after being released from medical treatment, on May 22, 2006, orthopedic surgeon Dr. Edward J. Prostic examined claimant at the request of her attorney. Dr. Prostic determined claimant had mild degenerative disk disease at C6-7 and had symptoms typical of cervical radiculopathy and signs typical of peripheral nerve

[2] P.H. Trans. (March 21, 2006) at 23.

entrapment. According to the doctor, it was possible claimant had cervical radiculopathy that was not severe enough to provoke by physical exam or that she had carpal tunnel syndrome that was not severe enough to provoke by physical exam. But she did have signs of ulnar nerve entrapment at the wrist and a loss of motion at her neck.

Regarding permanent restrictions for her left shoulder and neck, Dr. Prostic adopted those propounded by Dr. Hood, which were to avoid lifting over 25 pounds and avoid repetitive overhead use. In addition, Dr. Prostic concluded that claimant limit using vibrating equipment to a minimum with her left upper extremity. After reviewing the list of former work tasks prepared by vocational counselor Michael J. Dreiling, the doctor concluded claimant was unable to perform seven of the eight tasks, or 87.5 percent, that claimant performed in the 15-year period before her November 14, 2005, accident.

Claimant returned to work for respondent the final time on August 11, 2006, and worked for approximately three hours. According to claimant, somebody called away the laborer that was working with her, which left her to lift and handle 14-foot-long pieces of lumber. According to claimant, she used an electric saw that day and also used a hammer drill. Claimant reported to her supervisor that she was hurting and asked to see a doctor. The supervisor sent her to respondent's offices, where she waited three hours before speaking with the vice president, Mark Teahan. Claimant again requested medical treatment, which was again denied. Claimant advised respondent she could not do the work. But respondent contended the work was within her restrictions.

Consequently, claimant has self-treated with ice packs and heat packs. In addition, claimant consulted her personal physician, who prescribed medications. As of December 2006, claimant was taking five tablets of Percocet, a pain medication, daily, and four tablets of Flexeril, a muscle relaxant, weekly.

The last doctor claimant saw for her neck, upper back, and left shoulder injuries was Dr. Vito J. Carabetta, who is board-certified in physical medicine and rehabilitation and who examined claimant at the request of the insurance fund involved in this claim. Dr. Carabetta believed claimant had a regional myofascitis and left shoulder area pain. The doctor also noted that claimant had osteoarthritic changes at the left acromioclavicular joint. More importantly, the doctor recommended that claimant avoid overhead activity, use her arms overhead for only brief periods, and limit overhead lifting to no more than about 25 pounds.[3] Dr. Carabetta also believed claimant should avoid using sledgehammers, pry bars to remove nails, and vibratory equipment. Finally, Dr. Carabetta concluded any increased use of claimant's arms would worsen her symptoms between the shoulder

[3] On cross-examination, at page 45, Dr. Carabetta further indicated claimant should avoid any lifting that exceeded 25 pounds.

blades and in the shoulder girdle and that claimant would be far better off if she found employment doing something other than carpentry.

Preexisting injuries

Claimant's November 2005 neck, left shoulder, and upper back injuries were not the first injuries that claimant had endured during her career as a carpenter. In the late 1980s, claimant injured her low back while working for another construction company. For that injury, claimant initiated a workers compensation proceeding, which she later settled. Over the following years claimant occasionally sought chiropractic treatment for her ongoing low back symptoms. Moreover, the medical records introduced at the March 21, 2006, preliminary hearing indicate on May 18, 2005, claimant told Dr. William O. Reed's physician assistant she had a longstanding history of low back pain that was stable until May 12, 2005, when she slipped on a rock while fishing.

After an MRI scan and a discography of her low back to attempt to determine the location of her problem, Dr. Reed concluded treatment should be initially directed to the L4-5 lumbar disk. Accordingly, as early as September 2005 the doctor believed claimant was a candidate for either an artificial disk or a spinal fusion. Claimant did not undergo either surgery as she did not return to Dr. Reed after a November 29, 2005, appointment.

In addition to low back problems, the medical records also indicate claimant had bilateral carpal tunnel releases and a left ulnar nerve transposition before her November 14, 2005, accident. But those injuries did not prevent claimant from performing her work as a concrete form carpenter for respondent. Indeed, it appears claimant made little complaint regarding those injuries during the physical therapy she received for her neck, upper back, and left shoulder following her November 14, 2005, accident.

Permanent partial general disability formula under K.S.A. 44-510e

Claimant's November 14, 2005, accident resulted in injuries to her neck, left shoulder, and upper back. As claimant "is disabled in a manner" that is not covered by the schedule of K.S.A. 44-510d, K.S.A. 44-510e defines her permanent partial disability. That statute provides, in part:

> Permanent partial general disability exists when the employee is **disabled in a manner** which is partial in character and permanent in quality and **which is not covered by the schedule in K.S.A. 44-510d** and amendments thereto. The extent of **permanent partial general disability shall be the extent**, expressed as a percentage, to which **the employee**, in the opinion of the physician, **has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the**

> **accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury**. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.[6]

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

---

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as the Kansas Supreme Court has recently held that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland*. See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007); and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[7] *Copeland*, 24 Kan. App. 2d at 320.

The Kansas Court of Appeals in *Watson*[8] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[9]

Good faith effort

As indicated above, claimant attempted on several occasions to return to work for respondent as a concrete form carpenter. Claimant contends she made a good faith effort in April and August 2006 to return to work for respondent but the nature of the work required her to exceed her limitations and work restrictions. Considering that work, the extent of claimant's injuries, and her limitations and work restrictions, that testimony is credible. Indeed, claimant testified how laborers to do the heavier lifting were not always available despite respondent's best intentions. In short, concrete form carpentry work requires the use of the upper extremities in a sometimes repetitive or strenuous manner, which presents a definite problem for claimant due to her injured neck, upper back, and left shoulder.

The Board is aware that respondent contends claimant was not required to violate her work restrictions when she returned to work in April and August 2006. The Board, however, finds claimant's testimony credible that she was unable to perform the lighter work provided by respondent due to intolerable pain from her left shoulder, upper back, and neck symptoms. On claimant's final attempt to return to work, which was in August 2006, she found she had to repetitively lift a power saw and lumber, which increased her symptoms. Claimant was not a complainer as indicated by her continuing to work despite ongoing low back symptoms and past surgeries to her arms. Claimant's contention that she was unable to perform the lighter work offered by respondent is supported by the

---

[8] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[9] *Id.* at Syl. ¶ 4.

medical consensus that she should pursue work in a less-demanding career other than carpentry.[10]

Moreover, in *Rash*,[11] the Kansas Court of Appeals held the offering or accepting of accommodated employment was simply another factor in determining whether a worker had engaged in a good faith effort to seek appropriate employment.

Finally, respondent's refusal to provide claimant with medical attention and making her wait three hours before meeting with her on August 11, 2006, raise doubts about respondent's good faith and its sincerity in addressing claimant's concerns about her work activities and her increased pain.

Wage loss

The Board concludes claimant made a good faith effort to return to work for respondent but she could not tolerate the work. The Board, however, finds that claimant has failed to establish she has made a good faith effort to find other work. When the record closed, claimant was earning approximately $250 per month cleaning the union hall and receiving approximately $1,249 per month from a disability pension through her labor union. Claimant's efforts to find other work, however, have been minimal. Consequently, the Board must impute a post-injury wage.

The only evidence regarding claimant's retained ability to earn wages in the open labor market is from claimant's vocational rehabilitation expert, Michael J. Dreiling. Mr. Dreiling interviewed claimant in early October 2006 and determined claimant had few transferable work skills. He concluded claimant was more than likely limited to unskilled entry level positions such as a light packing-type job, which would probably pay wages in the range of $320 to $360 per week.

The parties stipulated claimant's average weekly wage was $1,279.20 through August 30, 2006, and $1,584.46 after that date. For purposes of the permanent partial general disability formula, the Board finds claimant's post-injury wage is $340 per week, which creates an initial wage loss of 73 percent, followed by a 78.5 percent wage loss.

[10] See *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), where incapacitating pain, rather than medical restrictions, prevented the worker from earning a comparable wage.

[11] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

Task loss

The Board affirms Judge Nodgaard's finding that claimant sustained an 87.5 percent task loss due to the November 14, 2005, accident.

As indicated above, Dr. Prostic, who was the only doctor to address claimant's task loss, concluded claimant had lost the ability to perform seven of the eight tasks, or 87.5 percent, that she had performed in the 15-year period before her November 14, 2005, accident. And contrary to respondent's argument, Dr. Prostic testified that task loss was related to the November 14, 2005, accident that resulted in claimant's neck, upper back, and left shoulder injuries. The doctor testified, in part:

> Q. (Mr. Smith) Based on your assessment of restrictions for this patient's November 14, 2005, injury and those tasks, do you have an opinion that you can give us regarding any task loss that Ms. Purinton has suffered?
>
> A. (Dr. Prostic) Yes, I have an opinion.
>
> Q. And what is that opinion, Doctor?
>
> A. She is unable to perform Tasks 2 through 8. So she's unable to perform seven of the eight tasks.
>
> Q. And would that be secondary, in your opinion, to the -- that task loss to the injury of November 14, 2005?
>
> A. Yes.[12]

Dr. Prostic's task loss opinion is uncontradicted.

Permanent partial general disability

Averaging the 87.5 percent task loss with the initial 73 percent wage loss yields a permanent partial general disability of 80 percent. But that disability rating increases to 83 percent commencing August 31, 2006, when the wage loss increases to 78.5 percent.

In summary, the Board adopts the findings and conclusions set forth by the Judge to the extent they are not inconsistent with the above. The record adequately addresses the issues and, therefore, a remand is unnecessary. Moreover, the May 17, 2007, Award is supported by the greater weight of the evidence and should be affirmed.

---

[12] Prostic Depo. at 13, 14.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[13] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the May 17, 2007, Award entered by Judge Nodgaard.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire any fee in this matter, counsel must submit the written agreement to the Judge for approval as required by K.S.A. 44-536.

IT IS SO ORDERED.

Dated this ____ day of December, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
C. Anderson Russell, Attorney for Respondent and its Insurance Fund
Robert H. Foerschler, Administrative Law Judge
John Nodgaard, Special Administrative Law Judge

[13] K.S.A. 2006 Supp. 44-555c(k).